IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1976

No. 76-1663

FREDERICK CONTRACTORS, INC., *et al.*,

Petitioners,

v.

METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF BETHESDA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND

PRELIMINARY STATEMENT

Frederick Contractors, Inc. prays that the Writ of Certiorari issue to review a judgment of the Court of Appeals of Maryland, entered on February 24, 1977 in the case styled *Residential Industrial Loan Company, Inc. v. Manuel M. Weinberg, Trustee, et al.* and *Frederick Contractors, Inc. et al. v. Metropolitan Federal Savings and Loan Association of Bethesda* No. 120, September Term, 1976.

OPINIONS

The original decision of the Court of Appeals of Maryland decided on February 24, 1977 is included herein as Appendix A. An extract of Petitioners' memorandum in the Circuit Court for Montgomery County, Maryland raising the Federal issue is set forth herein as Appendix B. An excerpt from Petitioners' Brief in the Court of Appeals of Maryland raising the Federal question is included herein as Appendix C.

JURISDICTION

The Jurisdiction of this Honorable Court to issue a Writ of Certiorari is grounded on 28 U.S. Code §1254.

QUESTION PRESENTED

DID THE COURT OF APPEALS OF MARYLAND ERR IN HOLDING THAT THE MARYLAND MECHANICS LIEN LAW AS APPLIED TO THESE PARTIES VIOLATED THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED:

Md. Code (1974 and 1975 Cum. Supp.), Real Prop. Art., §§9-101 to -111.
14th Amendment, Federal Constitution.

STATEMENT OF THE CASE

On March 26, 1975, the Court of Appeals of Maryland held that Frederick Contractors, Inc., had a mechanic's lien but must wait for arbitration to foreclose its lien. Because of a delay on the part of the landowner, Bel Pre Medical Center, Inc., in paying the necessary fees to go to arbitration, the panel was not to hear the case until January 15 and 16, 1976. When the day for the arbitration hearing approached, Bel Pre withdrew its request for arbitration. Frederick Contractors, Inc., promptly petitioned for a hearing to enforce its mechanic's lien. A hearing was held on February 26, 1976, and an Order appointing Manuel M. Weinberg and Rex L. Sturm as trustees to sell was entered on that date. On February 10, 1976, the Court of Appeals filed its opinion in *Barry Properties, Inc.* vs. *Fick Bros. Roofing Co.*, 277 Md. 15 (1976). This case held the Maryland mechanic's lien law unconstitutional. The Trustees scheduled a foreclosure sale for April 9, 1976. Upon the application of Metropolitan Federal Savings and Loan Association and Residential Industrial Loan Company, owners of Deeds of Trust on the property, the sale was enjoined by the Circuit Court on April 9, 1976. The trustees under the Deed of Trust securing Metropolitan Federal Savings and Loan Association scheduled a sale for June 14, 1976. That sale was enjoined by the Referee in Bankruptcy for the Federal District Court for Maryland.

On July 16, 1976, a hearing was held to determine the priorities between the parties to this action. On August 20, 1976, an order was filed in the Circuit Court for Montgomery County, Maryland ruling the order of priorities with Metropolitan Federal first, Frederick Contractors second, and Residential Loan Company third.

An appeal was taken by the Residential Industrial Loan Company and Frederick Contractors, Inc. The Court of Appeals of Maryland granted certiorari and upon hearing held that th: mechanic's lien law of Maryland was void *ab initio* and therefore the two Deeds of Trust took priority because they were recorded prior to the Court decree for foreclosure. Thus, the priority was held to be: First, Metropolitan Federal; Second, Residential Industrial Loan Company; and Third, Frederick Contractors, Inc.

STATEMENT OF THE FACTS

This case involves the order of priorities among two owners of Deeds of Trust notes and a holder of a mechanic's lien on property owned by a bankrupt landowner, Bel Pre Medical Center, Inc. In 1971 Frederick Contractors, Inc. agreed with the landowner, Bel Pre, to construct an addition to a nursing home and began construction shortly thereafter. On November 30, 1972 Bel Pre executed a Deed of Trust covering the real property involved securing a Note for $1,400,000.00 to Metropolitan Federal Savings and Loan which Deed of Trust was recorded in the Land Records on December 12, 1972. The construction was completed in January 1973 at which point approximately $148,000.00 was claimed by Frederick Contractors, but was disputed by Bel Pre. Metropolitan and Bel Pre were advised under the statutory procedure of the intent to file a mechanic's lien against the property and on March 22, 1973 a mechanic's lien was filed in the Land Records. On April 30, 1973 a Bill of Complaint to foreclose the lien was filed.

On April 18, 1973 some twelve (12) days earlier a Deed of Trust securing a loan in the amount of $160,000.00 from Residential Industrial Loan Company, Inc. was

executed. On May 11, 1973 some eleven (11) days after the filing of the Bill of Complaint, this Deed of Trust was recorded in the Land Records.

From that time until March 26, 1975, the case traveled through the Court system in Maryland and on March 26, 1975 the Court of Appeals stayed the foreclosure proceeding "until arbitration [was] concluded or Bel Pre's demand [was] withdrawn."

The arbitration proceedings were eventually scheduled for hearing on January 15 and 16, 1976, but when the day for arbitration approached, Bel Pre's demand was withdrawn. Frederick Contractors promptly petitioned for a hearing on its foreclosure proceeding and such a hearing was held on February 26, 1976. Bel Pre at that hearing did not dispute the amount nor the right to a mechanic's lien nor did it raise any defense of constitutionality. The Court thus entered a "Decree for Enforcement of Mechanics Lien and Appointment of Trustees for Foreclosure Sale."

On February 10, 1976, the *Barry Properties, Inc.* vs. *Fick Bros. Roofing Co.* decision was filed by the Court of Appeals of Maryland holding that prior to a judicial hearing a mechanic's lien does not attach to real estate.

A foreclosure sale was scheduled by the trustees for April 9, 1976 and the two Deeds of Trust Note holders filed a Bill of Complaint to enjoin the sale and requested that the mechanic's lien be declared junior to their liens.

Subsequently, Bel Pre went into bankruptcy and the bankruptcy Judge permitted the Circuit Court of Maryland to hear the question of priority of liens. Such a hearing was held and the trial Judge entered an order declaring that Metropolitan had a first lien, Frederick had a second and Rilco had a third lien.

The Court of Appeals of Maryland upon hearing the case held that the mechanic's lien law under which the case was decided was unconstitutional in that it gave the mechanic's lien holder priority before a judicial determination of the validity of lien was held.

ARGUMENT

THE STATE COURT OF APPEALS ERRED IN DECIDING THAT THE MECHANICS LIEN LAW OF MARYLAND VIOLATED THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION.

This case presents the question of the validity of Maryland's Mechanics Lien law. The concept has previously been before the Court in the case of *Roundhouse Construction Corp.* v. *Telesco Masons Supplies Company, Inc.* (67 Conn. 371, 362 A.2d 778 (1975), which was remanded by the Court to consider whether the decision was based upon Federal or State Constitutional grounds, 423 U.S. 809, 96 S. Ct. 20, 46 L.Ed.2d 29. Upon remand the Connecticut Court reconsidered and held that its decision was based upon *both* State and Federal Constitutions, thus avoiding review of its decision by this Court (cert. denied, 97 S. Ct. 246).

During the pendency of the Connecticut case, the Court of Appeals of Maryland held sections of its mechanics lien law unconstitutional and clearly based that result upon the Federal Constitution. *Barry Properties, Inc.* v. *Fick Bros. Roofing Company*, 277 Md. 15, 353 A.2d 222 (1976). The Maryland Court then held that the particular landowner had not been deprived of due process and upheld the lien, thus avoiding the possible scrutiny of the Supreme Court. (A maneuver labeled "wizardry" in the dissenting opinion.)

The Maryland case now stands alone in finding that mechanics liens are invalid solely because they violate the due process clause of the Federal Constitution. The Federal Courts have uniformly found to the contrary. See *Spielman-Fond, Inc.* v. *Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973) (per curiam), aff'd 417 U.S. 901 (1974), *In Re Thomas A. Carey, Inc.*, 412 F. Supp. 667 (E.D. Va) (1976), even in Connecticut, *Brook Hollow Associates* v. *J. E. Greene, Inc.*, 389 F. Supp. 1322 (Conn. 1975).

Mechanics liens fall within the decision in *Coffin Brothers* v. *Bennett*, 277 U.S. 29, 48 S. Ct. 422, 722 Ed. 768 (1928) in which it was noted that nothing is more common than a lien dependent upon the result of a suit.

The Maryland Court struggled with the question of whether the law deprived a debtor of a "significant property interest" but a review of the cases considered by the Supreme Court show that each involves a "possessory" interest and not a notice to others that the property may be subject to a prior claim. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349, *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556, *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 406 and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L.Ed.2d 751. Under a mechanics lien, only *foreclosure* can deprive the owner of possession and under the statute that only can occur after notice and a full judicial hearing.

Some of the considerations in *Mitchell* supra, (holding no violation of due process) are applicable here. In that case the Court dealt with conflicting interests in the same property. A claim under a mechanics lien relates to *additions* to the land which the lienholder claims to have made. Both parties claim an interest in the subject matter of the lien. The lien statutes were based upon unjust enrichment of a landowner where ancient theory and time honored practice held that once attached personal property legally became a part of the land.

The basic error of the Maryland Court in declaring the lien unconstitutional was compounded with the following holding:

> "Under this ruling, we believe, the statute continues to effectuate the primary legislative intent, yet the owner is not deprived of a significant property interest without due process since the owner's interest is not impinged upon until after he is provided with notice and an opportunity for a hearing. It follows that §9-107(b), to the extent that it grants mechanics' liens "priority over

any mortgage, judgment, lien or encumberance attaching to the building or ground subsequent to the commencement of the building" but prior to the time the lien is established by a judicial determination, is also null and void since to hold otherwise would permit contractors to seize with their left hand what we have said they cannot grasp with their right."

A startling new Constitutional concept has been conceived. As a result we are dealing, not with possessory rights of the individual property owner, but the security rights of large corporate banking and financing institutions. The tug of war between a lien holder and his interest in property which he has placed upon the land is no longer between him and the landowner. It is now between the creditor of the landowner whose loan was made into the teeth of the lien perhaps the day before the judicial hearing as to the value of the lien is held. The deprivation in this case is visited upon the lienholder. Surely such a result is not contemplated under any of the decisions to date on denial of due process and deprivation of property right.

The issue is ripe for a full airing and only this Court can bring the Court of Appeals of Maryland in line with the Federal Courts and the prior decisions of the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the demands of public policy and justice require in this case that a Writ of Certiorari should be granted and the judgment in this case reversed.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 120

September Term, 1976

RESIDENTIAL INDUSTRIAL LOAN COMPANY, INC.

v.

MANUEL M. WEINBERG, TRUSTEE, et al.

* * *

FREDERICK CONTRACTORS, INC., et al.

v.

METROPOLITAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF BETHESDA

Murphy, C. J.
Singley
Smith
Digges
Levine
Eldridge
Orth, J. J.

Opinion by Digges, J.

Filed: February 24, 1977

This suit involves the ordering of priorities among three real property lien creditors of the bankrupt Bel Pre Medical Center, Inc., two of which are owners of deeds of trust notes, and the other of which is a holder of a mechanics' lien. Concluding that under our ruling in *Barry Properties v. Fick Bros.*, 277 Md. 15, 353 A.2d 222 (1976), the mechanics' lien was not established until after the recordation of the deeds of trust, it follows that it is junior in priority to both of them.

Although we can only surmise from the facts of this case, we have little doubt that Frederick Contractors, Inc., which has been trying for the past four years to obtain payment for work completed in 1973, must at this point wonder why it has never gotten beyond the veritable Slough of Despond[1] which has prevented it from achieving even a modicum of success during all these years. Back in August of 1971, Frederick entered into a contract with Bel Pre to construct an addition to its nursing home in Silver Spring, Montgomery County, and work was begun shortly thereafter. In the autumn of 1972, before the addition was completed, Bel Pre sought to obtain a permanent first trust loan from Metropolitan Federal Savings and Loan Association of Bethesda, and by letter dated November 1, 1972, Metropolitan committed itself to make that loan in the amount of

[1] In John Bunyan's *The Pilgrim's Progress* (1678), the first stumbling block encountered on the pilgrimage to the Celestial City was the Slough of Despond, "the descent whither the scum and filth that attends conviction for sin doth continually run. . . ."

$1,400,000. At the settlement on November 30, Bel Pre executed a deed of trust covering the real property on which the nursing home is located securing its note for the $1,400,000 to Metropolitan; this deed of trust was duly recorded on December 12, 1972. Although the facts are not undisputed, it seems that at the time of this settlement, these parties together with Frederick contemplated that $150,000 of the loan would be held in escrow to insure completion of the addition and to secure the waiver of any mechanics' liens Frederick could claim for labor performed or materials provided through November 29, 1972. Following completion of the addition in January of 1973, Frederick demanded payment of a little over $148,000 from the $150,000 Metropolitan was then holding, but was unable to collect the money. Subsequently, an attorney for Frederick advised Metropolitan of its intent to file a mechanics' lien against the property owned by Bel Pre, and on March 22, 1973, Frederick recorded such an instrument. On April 30, 1973, Frederick filed a bill of complaint to foreclose its claimed lien.

Before the foreclosure proceedings could be terminated, several things happened: Bel Pre obtained another loan secured by a second deed of trust; pursuant to its contract with Frederick, Bel Pre demanded arbitration of Frederick's claim for payment; and Metropolitan disbursed to Bel Pre the $150,000 it was holding. Specifically, the record discloses that on April 18, 1973, a deed of trust securing a loan of $160,000 from Residential Industrial Loan Company, Inc. (RILCO) was executed, and this was recorded on May 11, 1973, subsequent to Frederick's bill of complaint to foreclose, but prior to any judicial determination of the issue. The next several years, however, found Frederick unable to establish its claim because it was entangled in a dispute, initiated by Bel Pre on May 22, 1973, over whether arbitration of Frederick's demand for payment was required before the mechanics' lien

could be foreclosed. The matter was not finally resolved until this Court issued its opinion on March 26, 1975, staying the foreclosure proceeding ["until arbitration [was] concluded or Bel Pre's demand [was] withdrawn." *Frederick Contr. v. Bel Pre Med.*, 274 Md. 307, 316, 334 A.2d 526, 531 (1975).] In the meantime, On May 23, 1974 to be exact, Bel Pre had requested and obtained disbursement to it of the $150,000 Metropolitan was then holding.

Had the mechanics' lien litigation been promptly terminated following our decision in *Frederick Contr. v. Bel Pre Med.*, the parties probably would not be here today, but unfortunately for Frederick, the chain reaction initiated by Bel Pre's demand for arbitration was to continue into 1976. The proceedings were delayed, and although the hearing was eventually scheduled for January 15 and 16, 1976, Bel Pre withdrew its arbitration demand at the eleventh hour. Finally free to pursue once again its mechanics' lien foreclosure case, Frederick promptly petitioned the Circuit Court for Montgomery County for an early hearing, which it received on February 26, 1976. On that day, the court entered a ["Decree for Enforcement of Mechanics Lien and Appointment of Trustees for Foreclosure Sale."] But it was already too late – two weeks earlier this Court had decided *Barry Properties v. Fick Bros.*, 277 Md. 15, 353 A.2d 222 (1976), where we held that, prior to the judicial establishment of a mechanics' lien, no such lien attaches to the real estate. Learning that the foreclosure sale was scheduled for April 9, 1976, Metropolitan and RILCO filed a bill of complaint three days prior to the sale seeking to enjoin it, and requesting that the court declare their liens "to be prior and senior to the mechanics' lien." The court consolidated this action and the original suit by Frederick against Bel Pre, and following a trial, Judge Stanley B. Frosh entered an order declaring that Metropolitan had a first lien, Frederick had a second lien, and RILCO had a third lien. Both losers appealed, and RILCO

petitioned this Court as well for a writ of certiorari which we issued before the Court of Special Appeals considered the matter.

The question at the heart of this litigation is the applicability of *Barry Properties*. In that case we ruled that portions of the Maryland mechanics' lien law then in force and controlling here, Md. Code (1974 & 1975 Cum. Supp.), Real Prop. Art., §§9-101 to -111, were unconstitutional because they operated to deprive property owners of a significant interest without due process of law.[2] Excising that aspect "which purports to create a lien from the time work is performed or materials furnished," we held that there could be no lien "until and unless the claimant prevails either in a suit to enforce the claimed lien or in some other appropriate proceeding. . . ." 277 Md. at 37, 353 A.2d at 235. We further noted that until that time, the claimant possessed only a chose in action, and that Section 9-107(b), to the extent it granted mechanics' liens priority over some encumbrances recorded before the lien was established by a judicial determination, was "null and void." *Id.* Undoubtedly, the full impact of *Barry Properties* applies in the present suit. Although we did not explicitly state in that case that the decision was to have retroactive operation, we indicated as much by noting that "those portions of the statute we hold unconstitutional are void *ab initio*. . . ." 277 Md. at 38, 353 A.2d at 235. While we will not always reach such a conclusion as to the effect of an unconstitutional statute, *see Perkins v. Eskridge*, 278 Md. 619, 366 A.2d 21 (1976), it is clear that we found no overriding concern dictating that we give those mechanics' liens recorded prior to February 10, 1976, the date of our decision in *Barry Properties*, any force

[2] Responding to the *Barry Properties* case, the General Assembly by Chapter 349 of the Laws of 1976 extensively revised this State's mechanics' lien statute. *See* Md. Code (1974, 1976 Cum. Supp.), Real Prop. Art., §§9-101, to -113.

unless and until a judicial determination takes place. *See also Scott & Wimbrow, Inc. v. Calwell*, 31 Md. App. 1, 6, 354 A.2d 463, 466, *cert. denied*, 278 Md. (1976).

Contrary to Frederick's contentions, we find nothing in the present action which takes it outside the scope of *Barry Properties*. It is of no significance that here the dispute is between a contractor holding a mechanics' lien and two other lien creditors as opposed to the situation in *Barry Properties* where the dispute was between a contractor and the property owner. In either case, no mechanics' lien attaches to the property until the claimant has prevailed in an "appropriate proceeding" to establish the lien's existence. Moreover, in spite of Frederick's argument to the contrary, it is clear that the *Bel Pre* case before this Court in 1975 was not a proceeding which resulted in the creation of a mechanics' lien. The only issue we decided was whether Bel Pre's demand for arbitration precluded Frederick from establishing its mechanics' lien until arbitration proceedings had been terminated. Consequently, by no stretch of the imagination can the "law of the case" or the res judicata doctrine catapult Frederick to first place. Finally, we are also of the view that the doctrine of lis pendens cannot aid Frederick here, since it has been determined that as of the time of the recording of the two deeds of trust, Frederick had no interest in the Bel Pre property.

It is apparent from the foregoing that the order of the priorities is as follows: Metropolitan first, RILCO second, and Frederick third. This is so because Metropolitan recorded its deed of trust on December 12, 1972, RILCO recorded its instrument on May 11, 1973, and Frederick did not obtain a mechanics' lien until February 26, 1976. Since we here decide

only the priority issue, nothing in this opinion should be construed as indicating our views as to the merits of any other actions not pending or which may arise among the parties to this suit.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND REVERSED IN PART AND CASE REMANDED TO THAT COURT FOR ENTRY OF AN ORDER AS HEREIN STATED. COSTS TO BE PAID BY MANUEL M. WEINBERG AND REX L. STURM, TRUSTEES, AND FREDERICK CONTRACTORS, INC.

APPENDIX B

It should be understood that the facts in the *Barry* case did not relate to priority of liens, *vis a vis*, a mortgage or deed of trust; although a portion of the statute relating to priority was declared unconstitutional. It is suggested that the portion of the opinion of the Court of Appeals would not bear up when weighed against the facts in this case. The Court should apply the *tests* of constitutionality to the facts of this case against the statutes involved.

The tests of constitutionality applied are notice and a prior hearing. Metropolitan nor any other party has challenged the validity of the lien nor has a serious challenge of its amount been raised. Metropolitan had actual notice as outlined above of the claim for approximately $150,000 to pay for the construction work. All other parties had notice by *lis pendens*, a doctrine which the Court of Appeals certainly has not discarded (Maryland Rule BD1).

There is no question of the validity of the Mechanics Lien of Frederick Contractors, only the issue of waiver which is addressed above. The Court of Appeals should reexamine the applicability of its constitutional tests to the facts as they arise in this case and as they most often arise in other cases before making a determination of constitutionality. The Supreme Court cases relating to notice and prior hearing (*Sniadach* v. *Family Finance Corp.*, 395 U.S. 342; *Fuentes* v. *Shevin*, 407 U.S. 371; *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 614). Each involve a *possessory* interest, not a mere financial interest; and it is submitted that the Court of Appeals has overreached the constitutional limitations in the dicta which relates to the priority of a mechanics lien.

The only reason given for this remarkable decision is that "to hold otherwise would permit contractors to seize with their left hand what we have said they cannot grasp with their

right." Where this principle is set forth or implied by the Constitution, we suggest needs further exploration by the Court of Appeals.

We point out in note (13) of the opinion in the *Barry* case the Court exercised the restraint which it should have with respect to issues not before it.

APPENDIX C

ARGUMENT

I.

THE CIRCUIT COURT FOR MONTGOMERY COUNTY WAS IN ERROR IN NOT GIVING PRIORITY TO THE CROSS-APPELLANT OVER THE APPELLEE.

Frederick Contractors because of the interpretation of the lower court of the decision in the case of *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, (decided February 10, 1976) 277 Md. 15, 353 A.2d 222, finds itself in a position that a Court of Equity should abhore. This Court in *Frederick Contractors v. Bel Pre Medical Center*, 274 Md. 307, 334 A.2d 526 (1975) decided that the Cross-Appellant was entitled to its mechanic's lien. From that case's inception, when Frederick had its lien and this Court agreed, in spite of a provision for arbitration, that "an award in Frederick's favor may be enforced or alternatively Frederick's claim may be satisfied by the foreclosure of the lien," Frederick Contractors was able to rely for protection on the Mechanic's Lien law at *that* time, enforced by a mandate by this Court. At no time during this entire case was any defense raised to the merits of the lien itself by anyone, Bel Pre, Metropolitan Federal nor Residential Industrial Loan Co. and this Court knew from argument and record about the existing Deeds of Trusts held by Metropolitan Federal and Residential Industrial Loan Co. Everyone knew that the lien was a valid one and could be enforced if the arbitrators awarded money to Frederick Contractors. Never did Bel Pre claim that the statute was unconstitutional and in fact after the *Frederick Contractors v. Bel Pre Medical Center* decision, Bel Pre chose not to arbitrate nor present the alleged waiver of liens. If there had been a

valid waiver, the case would never have gone further than the original hearing in the Circuit Court for Montgomery County. Metropolitan Federal was holding the money, and knew that it was available to protect itself against Frederick Contractors' mechanic's lien.

Now, Frederick Contractors, armed with this mandate, finds that this same Court in the *Barry* case has decided only months later that the statute is unconstitutional and Frosh, J. applied it retroactively to Frederick Contractors' mechanic's lien.

See 46 Am Jur 2d Judgments Sec. 19 which states:

> "The fact that a Judgment in a civil action is based upon an unconstitutional statute or ordinance does not render it void or deprive it of its effect as a judgment."
>
> "The modern view is based on theory that the court rendering the judgment has jurisdiction to determine the validity of the statute, that the parties derive their rights, not from the unconstitutional statute, but from the unreversed and unvacated judgment and that the finality of the judgment is not affected by the unconstitutionality of the statute."
>
> Sec. 2: "The definition of a judgment as a final determination of the rights of the parties in an action has been declared broad enough to include all final judgments, whether they are for money or for some other kind of relief."

It is respectfully suggested that this Honorable Court take a long, hard look at the effect of the *Barry* case on contractors who acted in good faith upon a long standing legitimate remedy only to find this remedy retroactively pulled out from under them in mid-stream when the statute which affords the remedy is declared unconstitutional. In 16 Am Jur 2d Constitutional Law Section 178:

> "It has been stated that an unconstitutional law should not be applied to work a hardship or impose a liability

on one who has acted in good faith and relied on the validity of a statute before the courts have declared it invalid."

The case of *Scott & Wimbrow, Inc. v. Calwell*, 31 Md. App. 1, 354 A.2d 463 (decided June 3, 1976) went even further than the *Barry* case and stated that a prior recorded mechanic's lien would be a nullity ab initio. However, Gilbert J. went one more step and said:

"It would, therefore, *appear* that under *Barry Properties*, appellant not having prevailed 'in a suit to enforce the claimed lien *or in some other appropriate proceeding*' the alleged mechanic's lien is of no force and effect." (emphasis supplied)

Your Cross-Appellant contends that the previous case against *Bel Pre supra* was "some other appropriate proceeding." The matter of the right to a mechanic's lien was litigated and argued in the Circuit Court for Montgomery County, the Court of Special Appeals and in this Court. Cross-Appellant's lien meets the constitutional tests of *Barry* and should receive the benefits that were afforded it; namely, priority over Metropolitan Federal and Residential Industrial Loan Co. via a valid, enforceable lien. As is stated in 2 MLE Appeals Section 543:

"The rule that the determination rendered on appeal is the *law of the case* and binding on the lower court in further or subsequent proceedings therein has been held to apply even though such determination is erroneous and not withstanding the Court of Appeals, subsequent to its decision and while the case is still pending in the lower court, adopts a position in cases similar to the pending use which is inconsistent with the principals enumerated by it in such case." (emphasis supplied)

In the case at bar Frederick Contractors not only acted in good faith and relied on the validity of a statute, but it also had a mandate declaring the lien valid and enforceable, and it

relied on the fact that Metropolitan Federal was holding the funds. Even if this Court upholds the ruling in the *Scott & Wimbrow* case *supra* as to the retroactive effect on the statute by the *Barry* case *supra*, it is beyond all comprehension that, as against your Cross-Appellant, the ruling would be retroactive beyond the ruling in *Frederick Contractors v. Bel Pre, supra*. See also *Bay State Harness Horse Racing & Breeding Association v. PPG Industries, Inc.*, 365 F. Supp. 1299 (Mass. 1973), and *Gunter v. Merchants Warren National Bank*, 360 F. Supp. 1085 (S.D. Maine 1973), both of which held that the finding of the unconstitutionality of prejudgment real estate attachments was prospective only.

In Section 5(a) of an annotation in 10 ALR 3d 1371 it is stated:

"It has often been recognized that retroactive operation of an overruling decision is neither required nor prohibited by constitutional provisions, and that whether and to what extent a new rule adopted in an overruling decision will be given retroactive effect is thus not a matter of constitutional compulsion, but a matter of judicial policy, *to be determined by the Court after weighing the merits and demerits of the particular case*, by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation." (emphasis supplied)

It is respectfully suggested that the thrust of the *Barry* case was to protect the owner – not the lender. Regarding Metropolitan Federal, being the lender and not an owner, the *Barry* case should not be applicable. This issue is the crux of the case at bar! Who has priority between Frederick Contractors, Metropolitan Federal and Residential Industrial Loan Co.? As is argued elsewhere in this brief the Cross-Appellant had a valid lien ahead of the others and granted only a conditional Waiver of Liens to Metropolitan Federal which was not adhered to by Metropolitan Federal and its agents and they all knew it!

The position of the Cross-Appellant is that Sec. 9-107(b) is constitutional and does not violate the 14th Amendment of the U.S. Constitution nor Article 23 of the Maryland Declaration of Rights. As this Court stated, Fick Bros. was entitled to its lien because "The facts of this case show that the Appellant knew of the Appellee's claim to a lien sometime well prior to the Appellee's institution of this enforcement action but chose not to challenge the lien's validity at that point; we conclude it thereby elected not to assert any right it may have had to have its position determined as of a time earlier than the hearing before Judge Haile." In footnote 12 of the *Barry* case it is stated:

> "We do not here hold that the legislature could not enact a mechanic's lien law permitting general contractors and sub-contractors to obtain liens prior to owners being given notice and an opportunity for a hearing if the statute includes safeguards such as those discussed in (cases cited). Rather, in this case, we only hold that since the present law does not include such safeguards no lien can exist under it until after owners are provided with notice and a chance for a hearing."

The Cross-Appellants respectfully suggest that there is no difference between the case at bar and the position of Fick Bros. The facts show that Bel Pre (and Metropolitan Federal) knew of Frederick Contractors claim to a lien sometime well prior to Frederick Contractors institution of the enforcement action, and in fact, prior to settlement, (E. 3 & 40) but no one chose to challenge the lien's validity at that point (see *Frederick Contractors v. Bel Pre supra*) and it has to be concluded that there was an election by Bel Pre and Metropolitan Federal not to assert any right they may have had to have their position determined as of a time earlier than the hearing before Judge Frosh on February 26, 1976.

Factually, all of the guarantees required by the U.S. Constitution, the Maryland Declaration of Rights *and* the

Barry case have been met as to Bel Pre and Metropolitan Federal. The due process protections were there and the Appellant and Appellee have been fully protected except Frederick Contractors. If ever there was a case where Equity should be done to protect a party which has done everything equitably within its power to protect its interest and the interests of others, this is the case. The testimony and exhibits clearly show the intention of the parties, the escrow of the $150,000.00 and the conditional waiver of liens. (E. 8-40)

Quere: How can Metropolitan Federal, which admittedly was holding the money for the completion of construction, and obtained a conditional waiver of liens before it disbursed funds to Bel Pre, now turn around and say "We are first in priority."?

The comparison of the *Barry* case with the facts in the case at bar clearly show that to deny Frederick Contractors a lien priority would fly into the face of the requirements established by the *Barry* case. As with Fick Bros., Bel Pre, the owner of the property through three stages of litigation had every opportunity to attack the lien on the basis of the waiver asserted by Frederick Contractors, which, it chose not to do. The purpose of the *Barry* decision was to protect Barry Properties in that case and Bel Pre in this case. Construction was substantially completed in December, 1972, on March 22, 1973 Frederick Contractors recorded a Mechanic's Lien in the Montgomery County Circuit Court and on April 30, 1973 filed a Bill of Complaint to foreclose the lien. On May 24, 1973 Bel Pre countered with a motion to strike the mechanic's lien, *grounded on the contention that the contract between Frederick Contractors and Bel Pre compelled arbitration of disputes arising out of the contract which Bel Pre had demanded.* This issue as to the validity of the lien raised by the owner came all the way up to this Court. This Court in the *Barry* case ruled that the statute was

unconstitutional because the law "permits an owner to be deprived of a significant property interest without notice or a prior hearing." However, in turning to the problem of Fick Bros. the court measured the position of Fick Bros. with respect to the statute as it stands free of those provisions (held unconstitutional).

> "The facts of this case show that the Appellant knew of the Appellee's claim to a lien sometime well prior to the Appellee's institution of its enforcement action but chose not to challenge the lien's validity at that point;" *Barry Properties, supra* at p. 235 & 236.

Fick was provided with notice and a hearing and the court concluded that the Appellant (Barry) was afforded due process prior to being deprived of its property.

The Cross-Appellant here can see absolutely *no* difference between the position of Fick and its own position. The lien was valid and enforceable as determined by this Court and therefore was prior to Metropolitan Federal's Deed of Trust. The so called "Waiver of Liens" was conditional and since the conditions were not met the waiver was void for lack of consideration.

Since Metropolitan Federal was admittedly holding the $150,000.00 for completion of construction there was no violation of due process as far as the lender was concerned. (E. -40) It was fully protected. So far as it was concerned the funds belonged to Bel Pre or the contractor depending on the outcome of any dispute they might have. (E.-46)

To recapitulate briefly, the owner Bel Pre had all the due process protections and is not now complaining as to the validity of the lien. The complainors are the two lenders, neither of which had any due process guarantees denied. If this Court decides (as it should) that Frederick Contractors stands on the same footing as Fick Bros., then the lien is a valid one and the only issue is not the *Barry* case but a question of fact as to who has the priority.

The Cross-Appellant submits that the lower court committed error in its findings of fact and its interpretation of the applicable law and the decision should be reversed, giving the Cross-Appellant a first priority over the two lenders.

II.

THE CROSS-APPELLANT HAS BEEN DENIED DUE PROCESS OF LAW BY THE DECISION OF THE MONTGOMERY COUNTY CIRCUIT COURT PUTTING IT BEHIND THE APPELLEE IN PRIORITY.

Realistically, the *Barry* case was a decision that had regrettable import. The decision, if held to bar the Cross-Appellant's mechanic's lien, deprives the Cross-Appellant of a property right without due process of law in violation of the 14th Amendment to the Constitution of the United States and Article 23 of the Declaration of Rights. In cases from other jurisdictions and in Federal Courts the logic of the *Barry* case is looked at with little favor. In fact these decisions did not find that the property owner lost a "significant property interest." In *Brook Hollow Associates v. J. E. Greene, Inc.*, 389 F. Supp. 1322 (Conn. 1975) the court cited with approval the ruling in *Spielman-Fond, Inc. v. Hansons, Inc.*, 379 F. Supp. 997 (Ariz. 1973) which said:

> "It cannot be denied that the effect of such lien may make it difficult to alienate the property. If the plaintiffs can find a willing buyer, however, there is nothing in the statutes or the liens which prohibits the consummation of the transaction. Even though a willing buyer may be more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do nothing more than impinge upon economic interest of the property owner. The right to alienate has

been harmed, *but the difficulties which the lien creates may be ameliorated through the use of bonding or title insurance.*" (emphasis supplied)

This Court in the *Barry* case *supra* while making a few minor distinctions to the *Spielman-Fond, Inc.* case *supra* acknowledged that the Arizona law did not provide for notice of a prior hearing (just like the Maryland law) and stated "... the Supreme Court *may* have thought that the Arizona law contained enough safeguards to satisfy due process...." (emphasis supplied)

In a post *Barry* decision, *In Re Thomas A. Carey, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976) the Court cited *Spielman-Fond, Inc.* and *Brook-Hollow Associates supra* with approval and ruled that the Virginia mechanic's lien law (which is similar to Maryland's old Mechanic's Lien law) did not violate the due process clause of the 14th Amendment as there was no deprivation of a "significant property interest." The Court "was mindful" of the *Barry* decision but considered "the wiser course is to follow the decisions of the other District Courts." It is felt most important to point out that in this decision the Court considered the decisions in *Sniadach v. Family Finance Corp.*, 395 U.S. at 337, 89 S. Ct. 1820, 23 L. Ed.2d 349, *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L Ed.2d 556, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L Ed.2d 406 and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L Ed.2d 751.

For another post *Barry* decision holding a prejudgment attachment procedure as applied to real estate does not deprive a debtor of a "significant property interest," see *First Recreation Corp. v. Amoroso*, 26 Ariz. App. 477, 549 P.2d 257 (Ct. of Appeals, Ariz. 1976). See also *Carl A. Morse, Inc. v. Rentar Indus. Develop. Corp.*, 379 N.Y. S.2d 994 (1976).

In another state – Georgia, the mechanic's lien law statute is substantially similar to the old Maryland mechanic's lien law and the Supreme Court of Georgia in *Tucker Door &*

Trim Corp. v. Fifteenth St. Co., 235 Ga. 727, 221 SE.2d 433 (1975) in its opinion stressed the importance of the mechanic's lien to contractors, and held that the filing of the lien does not deprive the owner of a "significant property interest" since it does not deprive the owner of possession and it is not until the foreclosure of the lien, after full judicial proceeding, that any judgment attaches against property. The filing of the claim of a lien is similar to a lis pendens notice. See also *Matter of Northwest Homes of Chehalis, Inc. v. Weyerhaeuser Co.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 3/29/76 in 96 S. Ct. 1501, and *In Re The Oronoka*, 393 F. Supp. 1311 (Maine 1975).

In Connecticut, after the decision in *Roundhouse Construction Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 362 A.2d 778 (1975) the State Legislature enacted a procedure for validating mechanic's liens affected by the decision. The lienors had a period of time in which to refile their mechanic's liens. This procedure, it is submitted, was a recognition of the great hardships and unconstitutional denial of due process placed upon a contractor. Maryland did not proceed in this manner, but only enacted a Mechanic's Lien Law in accordance with the *Barry* decision, forgetting the contractors and sub-contractors caught in the middle of judicial process with no adequate relief.

It is most respectfully suggested that the *Barry* decision is unconstitutional as to contractors such as the Cross-Appellant who had filed their liens, and given notice thereof, but had not obtained a Decree to Foreclose, particularly where the present dispute is between lenders and a contractor.